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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 88

UNITED STATES OF AMERICA PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

ARGUMENT

This case involves the question of the amount of damages to be awarded where the United States Government changes its design on a reservoir so as to take in an additional parcel of land from the same landowner and such additional tract has been enhanced in value by reason of the original project.

The United States of America instituted condemnation action against the Respondents, landowners, on April 18, 1962.

In 1938 Congress authorized the construction of Nolin Reservoir. Funds were not allocated for the project until July, 1956. July 14, 1958 the General Design Memorandum was approved and it contained all phrases of construction and land acquisition. This Memorandum con-

templated the construction of recreational areas around the reservoir.

Funds for the project were appropriated October 12, 1958 and the project was started January 1, 1959.

The tract in issue here was purchased in two separate sales, the first being October, 1959 and the second January, 1960. A portion of the said tract lies below the 566 feet level which is the part of the reservoir. There is no question about this portion of the acreage as far as value is concerned as it was within the scope of the project.

However, 78 acres of the said tract lies above the reservoir and above the 566 feet level and was not contained in the project original design nor was it contained in the original Memorandum submitted on June 17, 1959. The 78 acres was first designated in Design Memorandum No. 8 and approved October 1, 1959. The question submitted to the Jury in the Trial Court was whether this property was probably in the scope of the project from the time the Government was committed to it and whether it was known it probably would be condemned.

Petitioner takes issue with the Sixth Circuit Court's interpretation of *Miller v. United States*, 317 U. S. 369, 63 S. Ct. 276, 87 L. ed. 336, in that it does not believe the Court should have submitted to the Jury the question of whether the 78 acres were within the scope of the project from the beginning of the Government's commitment to it. The Petitioner would have the Court believe that under Rule 71 A(h) Federal Rules of Civil Procedure only the narrow issue of just compensation may be submitted to the Jury.

As the Court of Appeals stated in the instant case, "In *United States v. Certain Lands, etc.*, 144 F. Supp. 206 (1956) the Court held that the issue of just compensation should not be interpreted as meaning that the Jury's function is to be restricted solely to dollar amounts. The Jury's province must be broad enough to weigh evidence which

relates directly to the issue of just compensation. Courts have repeatedly held that the question of whether or not a piece of property was within the scope of a project at a specific time is a proper one to be submitted to the Jury. *United States v. Miller,* 317 U. S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U. S. 798, cf. *John L. Roper Lumber Co. v. United States,* 150 F. 2d 329 (4th Cir. 1945). In *United States v. Crance,* 341 F. 2d 161 (8th Cir. 1965), it was only by agreement that the District Court, rather than the Jury, was to decide whether the land was within the scope of the project as set forth in *United States v. Miller,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U. S. 798. There only the monetary issue of just compensation was submitted to the Jury".

The Miller case appears to create uncertainty when it states that, "The question... is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay an increase in value arising from the known fact that the lands probably would be condemned..." 87 L. ed., at 344.

However, when one understands the factual situation in *United States v. Miller,* supra, there can be no misunderstanding of the rationale of the case.

The Court stated "the project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was *marked out* over the respondents' lands. (Emphasis supplied.) This being so, it was proper to tell the Jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property..." 87 L. ed., at 345.

Thus, it is clear that in the Miller case, the right-of-way over the landowners' property was in the original design "marked out". In the instant case it is equally clear that there wasn't one iota of evidence to show that the respondent's property was "marked out" or included in the original design plan. On the contrary the petitioner agrees that the original design did not include the respondent's property that is the subject of this appeal. There was nothing in the original design plan to alert the landowner that his land would be taken. In Miller, the original project plan contemplated flooding an area occupied by the tracks of a railroad. Miller's land was situated where the tracks would be relocated. This was the original design plan. The petitioner admits this was not the factual situation in the instant case, as the respondents' land was not originally contemplated for a recreation area.

The respondent states that where the factual evidence is clear then, as a matter of law, the Court should rule on the matter of enhancement; however, where the factual evidence is a mixture of law and fact as the Court stated in this case, then the jury should decide the question of enhancement.

The rule established in the Miller case is one of probability. Thus, a jury should determine cases where probability is not a certainty.

The Petitioner requests this Court to change *United States v. Miller,* supra, in regard to the "scope of the project" test. It is obvious, the petitioner could not prevail if the Court applies the Miller case test to the instant case. The Petitioner desires the Court to make a new rule that would state that any land adjacent to or near a project should not take on an enhanced value even if that land was not part of the original project. This concept violates all rules of equity or eminent domain.

To quote from the Third Circuit case of *United States of America v.* 172.80 *Acres of Land, supra*: "In sum, a

purchaser contemplating the acquisition and private development of the Totten property after the 1959 initiation of the reservoir project could reasonably anticipate that he would be able to devote the land to its highest economic use, enjoying advantages inherent in the proximity of the hereby government development without serious apprehension that his land would soon be condemned. Thus, enhancement of value during this period was properly included in the subsequent condemnation award. Cf. *Scott v. United States,* 5th Cir. 1944, 146 F. 2d 131; *Blas v. United States,* 9th Cir. 1958, 261 F. 2d 636".

Surely, the above case of *United States of America v.* 172.80 *Acres of Land* is squarely on point in the present case. The United States has offered no concrete proof or evidence that the 78-acre parcel was within the scope of the project from the time the government was committed to the plan. As stated previously, there is no question but that all land considered in this case, other than the 78-acre tract, was considered in the plan of the government at the time it became committed to the project. However, to say that the 78-acre tract was probably within the scope of the project from the time the government became committed to it merely on the basis that the land was adjacent to other lands to be taken is a clear violation of the spirit and rule of the above cases.

The defendants have shown by their witnesses that there was no general knowledge in the area of the Nolin Reservoir project that the 78 acres was to be taken. There was no mention by the United States through any of its agents of the planned recreation area until several years after the plans for the Reservoir project had been made known. Defendants have shown clearly the 78 acres were not within the scope of the project from its outset, but were merely adjacent lands taken by the government in the subsequent enlargement of the project, and therefore, the taking of

this parcel should not deprive the defendants of any enhanced value added by the proximity of the Reservoir.

Where the question of scope of the project is so interrelated with the question of just compensation, that it becomes impossible to set a value without consideration of that question, it should be decided by a jury.

Petitioner takes the position that Rule 71A(h) of the Federal Rules of Civil Procedure forecloses the possibility of jury consideration of any other question than the dollar value of the property in condemnation cases and cities among others the case of *U. S. v.* 91.69 *Acres in Oconee County*, 334 F. 2d 229, 321 (3 cir). However, the Oconee County case does not hold that the jury is limited by the language of Rule 71A(h). The said case involved the question of whether or not the Government, in condemning a portion of the landowners' property for a reservoir, was entitled to take a fee simple interest or merely a flowage easement. The District Court submitted the question to the jury in the form of an interrogatory and instructed them to find an amount for both a flowage easement and for the fee simple interest. On appeal the Court pointed out that the District Court was limited to the consideration of whether eminent domain was being used to acquire property for public use. Once that determination was made, the Court could go no further. The type and manner of estate the Government acquires is entirely a legislative and executive matter and not a question for the Court or the jury to decide. The Court remanded the case to the District Court with instructions to limit the jury's inquiry *U. S. v.* 91.69 *Acres in Oconee County*, 334 F. 2d 229, 231-232. The said case therefore can in no way be said to represent the proposition that the language of Rule 71A(h) limits the jury's inquiry to nothing more than the dollar and cent value of the property.

The Court has never had occasion to construe the language of Rule 71A(h) and there is as a result some

confusion as to the scope of the jury's inquiry in condemnation cases. The Petitioner contends that the better view is stated in *United States v. Crance* 341 F. 2d 161 (3d cir) and *Amen Wardy v. United States,* 402 F. 2d 762 (5th cir). The holdings in these cases are not compatible with the situation presented in the instant case. The Crance case involved land adjoining the line of a reservoir project which was being taken for a recreation area. As in the instant case the question was whether the property was within the scope of the project and therefore whether or not the landowner was entitled to recover for the enhanced value of his land as a result of his proximity to the reservoir. However, in the Crance case the question of whether the property was within the scope of the project was submitted to the Court by agreement of the parties. Neither side made any contention that the jury should decide the question or that it was in any way related to the question of just compensation. The question in this case was not considered in the Crance case. Here the respondents have consistently argued that the factual question of the scope of the project was so inextricably related to the question of value that the two together make up the question of just compensation.

The only case that can be said to have dealt directly with the question of who should decide whether a landowner is entitled to enhancement is *Amen Wardy v. United States,* 402 F. 2d 762 (5th cir.). In that case in a short opinion the Court dealt with the question of whether the landowner's property was within the scope of the project at the time the Government was committed to it. While the opinion does not contain very much information as to the factual matter it is possible to infer from a reading of the opinion that the Court decided the landowners knew or should have known that the land was going to be condemned before they purchased it. *Wardy v. United States* 402 F 2d 762, 763. The District Court in the instant case did not feel that the Government's evidence as to avail-

ability of information was such so as to overcome the landowner's evidence that the contemplated condemnation was not generally known. The tenor of the Wardy case was that the Court was convinced the landowners had purchased the property with the express purpose of placing themselves in the path of condemnation. Thus in the Wardy case the Court decided the factual evidence was so conclusive that it was not a jury question. Such is not the case here.

It is the contention of the petitioners that the more reasoned approach is that the jury should decide those questions of fact that are to be considered in the entire question of just compensation. As was pointed out in *John L. Roper Lumber Co. v. United States,* 150 F. 2nd 329 (4th cir.) and in *United States v. Certain Parcels of Lands in Middlesex County,* 144 F. Supp. 206, (3d cir.) the jury should not be limited strictly to the single question of the value of the land in terms of dollars and cents. The question which the jury is to decide is the question of just compensation and just compensation only. It is not to decide questions of the propriety of the taking, the validity or the invalidity of the use of any other question except the one. The question in *United States v. Certain Lands* supra, was a fact situation dealing with the necessity or lack of necessity of replacing a road taken by the United States. The question was submitted to the jury under Rule 71A (h) and the action was approved by the Circuit Court. The Court obviously felt that the whole question of whether or not the landowner was being justly compensated including the factual question of the necessity of replacing the road which the United States had taken. So in this case the question of whether or not the landowner is being justly compensated includes the factual question of whether or not the land being taken was within the scope of the project from the time the Government was committed to it.

This is the primary question. The Petitioner is contending that the question of just compensation as used in Rule 71A (h) means the dollar and cent value of the property being condemned. This assumption is fallacious. It is respondent's contention that the issue of just compensation includes those factual questions which determine whether or not the Government's offer will justly compensate the landowner. Consider the nature of condemnation proceedings. The landowner has the burden of proving that the value of his land is more than the Government has offered him, in other words that the sum of money which the Government has deposited with the Court will not justly compensate him for his property. The jury is therefore being called on to decide on ultimate factual question which may include several facts. One of those facts is the question of enhancement; first whether or not the landowner is entitled to enhancement; second what the value of that enhancement is. The question decided by the jury in this case was a question of whether or not the landowner was being damaged to a greater extent than the simple loss of his property i.e. whether or not he was losing the enhancement as well. This is a factual question and a question of just compensation. It is inextricably bound to the question of the correct valuation of the property. It is a question properly put to the jury in this case.

The Government would have the Court believe that any land that lies adjacent to a reservoir project even though not in the original design plan or originally contemplated to be part of the plan should be denied enhanced value.

The sole reason apparently is it will save the Government money if this Rule were applied to the "scope of the project" test. The unfairness of this Rule to the landowners apparently does not enter into the Petitioner's consideration. The basic philosophy of eminent domain is violated by the Petitioner's argument and reasoning.

CONCLUSION

The respondents respectfully urge for the foregoing reasons, the decision of the Court of Appeals should be sustained with instruction to direct the District Court on remand to determine whether the facts in this case were so clear that it is a matter of law and the Court direct the Jury to consider only the enhanced value of the subject land or whether the evidence presents a mixed question of law and fact which the Jury should determine whether the enhanced value should or should not be allowed.

Respectfully submitted,

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December 1969.

McCLURE PTG. CO., INC., VERONA, VA.

OPINION

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1969

United States, Petitioner, v. W. G. Reynolds et ux. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

The United States brought this suit in the Western District of Kentucky to condemn more than 250 acres of the respondents' land for a federal development known as the Nolin Reservoir Project located in that State. An important issue in the case was raised by the respondents' claim that 78 acres of the land, taken for construction of recreational facilities adjacent to the reservoir, had not been within the original scope of the project.[1] A jury

[1] Congress authorized the Nolin Reservoir Project in 1938 as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers. See Act of June 28, 1938, § 4, 52 Stat. 1217. Congress first appropriated funds for the planning stage of the project in 1956. See Public Works Appropriation Act of 1957, 70 Stat. 479–480. In July 1958 the Chief of Army Engineers approved a general design memorandum contemplating the construction of recreational areas in connection with the project, but evidently not specifying where they would be. The first funds for construction were appropriated in 1958. See Public Works Appropriation Act of 1959, 72 Stat. 1573. Construction began in January 1959.

Most of the respondents' acreage condemned by the Government was taken because it would be inundated by the reservoir, and there is no question that this land was within the original scope of the project. But 78 acres of the tract were taken for the construction of recreational facilities adjacent to the reservoir itself. These 78

awarded the respondents $20,000 as just compensation for all the land taken. Upon an appeal by the respondents, the Court of Appeals for the Sixth Circuit reversed the judgment and ordered a new trial, finding that the District Judge in his instructions to the jury had erroneously referred to matters disclosed outside the jury's presence.[2] The trial and appellate courts were in agreement, however, in rejecting the Government's contention that the "scope of the project" issue was for the trial judge to decide and should not, therefore, have been submitted to the jury at all. There being a conflict between the circuits on this question,[3] we granted certiorari to consider a recurring problem of importance in federal condemnation proceedings. 396 U. S. 814.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And "just compensation" means the full monetary equivalent of the property taken.[4] The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.[5] In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property [6] at the

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acres were not referred to in a design memorandum submitted in June 1959. They were, however, designated for taking in a memorandum approved in October of that year. It has been Government policy to build recreational areas in conjunction with federal reservoir projects since 1944. Act of December 22, 1944, § 4, 58 Stat. 889.

[2] *United States* v. *811.92 Acres of Land*, 404 F. 2d 303.

[3] The Court of Appeals for the Fifth Circuit has held that the "scope of the project" issue is to be determined by the trial judge. *Wardy* v. *United States*, 402 F. 2d 762, 763.

[4] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326.

[5] *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 304.

[6] *New York* v. *Sage*, 239 U. S. 57, 61; *Boom Co.* v. *Patterson*, 98 U. S. 403, 408.

time of the taking.[7] But this basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee. It is one of these refinements that is in controversy here.

The Court early recognized that the "market value" of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary.[8] And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires.[9] On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.[10]

In *United States* v. *Miller*, 317 U. S. 369, the Court gave full articulation to these principles:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should

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[7] *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 386.

[8] *Shoemaker* v. *United States*, 147 U. S. 282, 304–305.

[9] *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 635–636; *United States* v. *Cors*, 337 U. S. 325, 332–334.

[10] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 81; *Boom Co.* v. *Patterson*, *supra*.

the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." 317 U. S., at 376–377.

There is no controversy in the present case regarding these basic principles. The parties agree that if the acreage in issue "was probably within the scope of the project from the time the Government was committed to it," substantially less compensation is due than if it was not. For if the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was outside the original scope of the project, its compensable value is properly measur-

able in terms of its economic potential as lakeside residential or recreational property.

The issue between the parties is simply whether the "scope of the project" question is to be determined by the trial judge or by the jury. There is no claim that the issue is of constitutional dimensions. For it has long been settled that there is no constitutional right to a jury in eminent domain proceedings. See *Bauman* v. *Ross*, 167 U. S. 548, 593. As Professor Moore has put the matter:

> "The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain." [11]

It is not, therefore, to the Seventh Amendment that we look in this case, but to the Federal Rules of Civil Procedure. Rule 71A (h) provides that, except in circumstances not applicable here, "any party" to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation," unless the court in its discretion orders that that issue "shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court." [12] The Rule

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[11] 5 Moore's Federal Practice ¶ 38.32 [1], at 239 (2d ed. 1969). (Footnote omitted.)

[12] The full text of Rule 71A (h) is as follows:

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the deter-

thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented. The critical inquiry is thus whether "the issue of just compensation," as that phrase is used in the Rule, is broad enough to embrace the question whether the condemned property was probably within the scope of the federal project.[13]

Although the matter could be decided either way without doing violence to the language of Rule 71A (h), we think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge. The

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mination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

[13] In *United States* v. *Miller*, *supra*, it appears that that question was decided by the trial judge, who excluded all evidence of enhanced value attributable to the project. 317 U. S., at 372–373. While this Court's opinion in *Miller* approved of that procedure, it is to be remembered that the case was decided before the adoption of Rule 71A (h) in 1951, at a time when federal courts in condemnation proceedings followed the procedures of the States in which they were located. See Advisory Committee Notes to Rule 71A; 7 Moore, *supra*, ¶ 71A.03, at 2716.

Rule gives the trial court discretion to eliminate a jury entirely. And when a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide "all issues" other than the precise issue of the amount of compensation to be awarded. It follows that it is for the judge to tell the jury the criteria it must follow in determining what amount will constitute just compensation, and that in order to do so he must decide the "scope of the project" issue as a preliminary matter. We therefore approve and adopt the procedural rule announced by the Court of Appeals for the Fifth Circuit in *Wardy* v. *United States*, 402 F. 2d 762, and hold that it is for the judge and not the jury to decide whether the property condemned was probably within the project's original scope.[14]

Finally, the Government asks us to take this occasion to "clarify" the "scope of the project" test. We think the test was stated with admirable clarity by a unanimous Court in *Miller:* if the "lands were probably within the scope of the project from the time the Government was committed to it," no enhancement in value attrib-

[14] "The question was whether appellants' 'lands were probably within the scope of the project from the time the Government was committed to it.' . . . Appellants contend that the jury should have been allowed to answer this question. Under Rule 71A (h) the jury's function is limited to determining 'just compensation.' It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of 'just compensation.'" *Wardy* v. *United States*, 402 F. 2d, at 763. See also *Scott Lumber Co.* v. *United States*, 390 F. 2d 388, 392 (C. A. 9th Cir.); *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 231–232 (C. A. 4th Cir.).

utable to the project is to be considered in awarding compensation. As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment.[15] The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

The judgment of the Court of Appeals is vacated, and the case is remanded to the United States District Court for the Western District of Kentucky for further proceedings consistent with this opinion.

It is so ordered.

[15] Compare *John L. Roper Lumber Co.* v. *United States*, 150 F. 2d 329, 332, with *Scott* v. *United States*, 146 F. 2d 131, 132–133.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1969

United States, Petitioner,
v.
W. G. Reynolds et ux.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

All constitutional questions aside, there was in the present case a right to trial by jury on "the issue of just compensation" as provided in Rule 71A (h). I do not see how "the issue of just compensation" can be decided without considering whether or not the property was probably within or not within the project's original scope. As the opinion of the Court makes plain, important questions of value turn on that decision. In this case it is seen in the difference between the value of the property as agricultural land and its value as potential lakeside residential or recreational property.

If it were certain beyond doubt that the property was within the original scope of the project, a different question might be presented. But there is nothing in this record to show that respondent's property was included in the original design. We deal here with probabilities or perhaps with possibilities. If the property were not within the original design, a purchaser could reasonably anticipate that he would be able to devote the land to its highest economic use reflected in part by its proximity to the government's project. Henry George [1] would have it otherwise; but that has not been the direction of our

[1] Progress and Poverty Book VI (15th Ann. ed. 1945).

economy. Hence what we are talking about is market value and that in turn includes all of the ingredients that make up price. The most central element of price in the area now litigated was the relation of the land to the original project and that issue was one of fact. The "issue of just compensation" [2] as used in Rule 71A (h) truly cannot be resolved without considering that question.

There seems to be no reason why the jury chosen by Congress to decide the final issue of "just compensation" should be denied the power to determine the subordinate issues of fact upon which the jury's final verdict must rest.

There are powerful forces loose in this country that deprecate the use of juries. The Department of Justice and other federal agencies [3] often seem to dislike juries in

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[2] In *United States* v. *Certain Lands*, 144 F. Supp. 206, a road was taken and the question of "just compensation" turned on whether the construction of a substitute facility was necessary. The court held that that issue of necessity was properly left to the jury:

"In the average condemnation proceeding, many factors must be considered in arriving at just compensation, factors which are only established and available after the exercise of a fact-finding process. There appears to be no reason for introducing a trial by jury into condemnation proceedings unless the jury's province is broad enough to include the weighing of evidence which directly relates to the issue of compensation. It would seem that in this case the determination as to whether any substitute facilities are required at all is indeed a part of the 'issue of just compensation,' one of the factors to be taken into account by the jury in reaching its verdict." *Id.*, at 214.

[3] The present Rule 71A, which in absence of an Act of Congress gives the courts discretion to have the issue of compensation decided by a commission of three, was inspired by the Act governing condemnations by the TVA. See Notes of Advisory Committee, 28 U. S. C., following Rule 71A. But that Act was amended in 1967. See 16 U. S. C. § 831X (Supp. IV). Under the amendment either party has on demand "an absolute right to a trial by jury." S. Rep. No. 930, 90th Cong., 1st Sess., 2. "Proponents of the legislation

condemnation cases. In my Circuit, juries have unexpectedly risen up in favor of homeowners and against Washington, D. C., and granted "just compensation" in large sums, in retaliation, it is believed, against hard-nose officials who, with all the power of the central government, seek to plow them under. At other times the jury has acted differently and cut down the award.[4] Juries in these condemnation cases perform, in other words, an historic restraint on both executive and judicial power. See *Bushell's case.* 6 How. St. Tr. 999, decided in 1670.

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indicated that no landowner should be denied his basic right to a trial by jury involving the condemnation of his property. In addition, it was indicated that the absence of a right to a jury trial had generated friction between TVA and landowners which was seriously affecting the public relations of that agency." *Ibid.*

The Senate Committee stated: "While the committee makes no judgment as to the benefits of either the commissioner or jury-trial system, it does feel that a right to trial-by-jury is basic to our American way of life, and accordingly recommends adoption of this legislation." *Id.*, at 3.

[4] See *John L. Roper Lbr. Co.* v. *United States,* 150 F. 2d 329, where the jury refused the land owner any increment of value occasioned by the land's proximity to the project.